[redacted]

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	3
Argument	8
Conclusion	17

CITATIONS

Cases:

Caha v. United States, 152 U.S. 211	13
Chaunt v. United States, 364 U.S. 350	10, 11
Carrado v. United States, 227 F. 2d 780, certiorari denied, 351 U.S. 925	9
Costello v. United States, 365 U.S. 265	9, 11, 15, 16
Cufari v. United States, 217 F. 2d 404	14, 15
Johannsen v. United States, 225 U.S. 227	8
Lilly v. Grand Trunk R. Co., 317 U.S. 481	13
United States v. Accardo, 113 F. Supp. 783, affirmed, 208 F. 2d 632, certiorari denied, 347 U.S. 952	9
United States v. Kessler, 213 F. 2d 53	10, 15
United States v. Mogtalbano, 236 F. 2d 757, certiorari denied *sub. nom. Genovese v. United States*, 352 U.S. 952	9
United States v. Profaci, 274 F. 2d 289	12, 15

Statutes and regulations:

Immigration and Nationality Act of 1952, Sec. 340(a), 66 Stat. 260, as amended, 68 Stat. 1232, 8 U.S.C. 1451(a)	2, 3
Naturalization Act of 1906, 34 Stat. 596, as amended, 8 U.S.C. (1934 ed.) 382	8
34 Stat. 597	13
8 U.S.C. 1427(a)	8
8 C.F.R. (1938 ed.) 70.7	12, 14
8 C.F.R. (1938 ed.) 70.8	14

Miscellaneous:

Wigmore, *Evidence* (3d ed., 1940), § 92-93	13
McCormick, *Evidence* (1954 ed.), § 162	13

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 155

JOHN ODDO, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A; R. 195-203) [1] is reported at 314 F. 2d 415. The opinion of the district court (Pet. App. B; R. 185-189) is reported at 202 F. Supp. 899. The findings of fact, conclusions of law (Pet. App. C; R. 190-191), and the decree of the district court cancelling the certificate of naturalization (Pet. App. D; R. 192-193) are not reported.

[1] "R." refers to the appendix to petitioner's brief in the court of appeals which is on file with the Clerk of this Court along with the opinion and judgment of the court of appeals. We have also filed with the Clerk the various exhibits introduced by the government at the denaturalization trial.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1963 (Pet. App. E; R. 204). The petition for a writ of certiorari was filed on May 24, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an alien's denial during the naturalization proceedings that he had ever been arrested constituted concealment of a material fact when he had been arrested numerous times, including for serious crimes within the five years immediately preceding naturalization.

2. Whether the government established, by "clear convincing and unequivocal" evidence that petitioner had fraudulently concealed such arrests in the naturalization proceedings.

3. Whether the denaturalization suit was barred by laches.

STATUTE INVOLVED

Section 340(a) of the Immigration and Nationality Act of 1952, 66 Stat. 260, as amended, 68 Stat. 1232, 8 U.S.C. 1451(a),[2] provides in pertinent part:

> It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title [8 U.S.C. 1421(a), designating the courts having jurisdiction to naturalize] in the judicial district in which the naturalized

[2] The amendment substituted "United States attorneys" for "United States district attorneys."

citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and cancelling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation * * *.

STATEMENT

Petitioner seeks review of the judgment of the court of appeals affirming the order of the United States District Court for the Eastern District of New York cancelling petitioner's certificate of naturalization under Section 340(a) of the Immigration and Nationality Act, *supra*, pp. 2-3, on the ground that it had been procured through wilful concealment of material facts. The district court found that petitioner had denied and concealed his record of prior arrests during the naturalization proceedings (R. 190-191).

1. The government proved at the denaturalization proceeding in the district court that petitioner had been arrested for vagrancy in April 1923, for burglary in June 1927, for disorderly conduct in March 1928, again for disorderly conduct in August 1929, for homicide in July 1930, and for vagrancy in January 1931.[3] Ex-

[3] In its findings, the district court did not mention the two arrests in 1928 and 1929 for disorderly conduct (R. 191). But by stating that "[t]he arrests concealed by [petitioner] included the following" the court suggested that other arrests had also been concealed.

The complaint alleged eleven different instances in which petitioner had been arrested between 1919 and 1931 (R. 175). Besides the six arrests mentioned in the text above, these other arrests were for disorderly conduct in May 1919, for traffic violations in Octo-

cept for the initial arrest for vagrancy in 1923, all these arrests occurred during the five-year period before petitioner's application for citizenship—the period for which petitioner was required to show good moral character.

The arrests of John Oddo were proved at the denaturalization trial by original and certified records of the New York City Police Department and the New York City courts, made and kept in the regular course of business (R. 15-16, 25-33, 35-39; Exs. 8-11).

Retired New York City Patrolman Louis White identified petitioner as the John Oddo whom he had arrested for vagrancy in January 1931 (R. 47-53).[4] Additional evidence of identity was supplied by a fingerprint expert who compared conceded samples of petitioner's handwritten signatures on various exhibits in evidence (*e.g.*, Exs. 2, 5, 6, 21-21E, 22; R. 9-14, 131-133) with the handwritten signature "John Oddo" on the reverse side of a homicide commitment paper dated July 29, 1930 (Ex. 16), and on a receipt for purged fingerprint records of the New York City Police Department (Ex. 20). The

---

ber 1927 and October 1928, for assault and robbery in August 1931 and for having an illegal occupation in October 1931. Of these five arrests, only the latter two were mentioned by the district court in its findings. We do not rely on these two arrests to show concealment since they occurred after petitioner swore before the Service examiners on August 3, 1931, that he had never been arrested.

[4] Two other New York City Police officers (James McIvor and Morris Coon) also testified to having participated in arrests of Oddo. McIvor arrested Oddo on the homicide charge in 1930, and, while he thought petitioner looked "like him," he could not make a positive identification (R. 86, 80-87). Detective Coon, who had arrested Oddo on the burglary charge in 1927, could not recall the circumstances of the arrest although he was able to identify notes he had made at the time describing the arrest (R. 96-97).

expert testified that all were "prepared by the same individual" (R. 136, see R. 133-137).

2. On the issue of fraudulent concealment, the government introduced into evidence various documents in petitioner's naturalization file. Because the Service examiners who had actually interviewed petitioner and passed upon his citizenship application papers on August 3, 1931, had subsequently died (R. 140-141),[3] Louis Dillon, a retired examiner who had been employed by the Service for 32 years and had worked in the Brooklyn office in 1931 (R. 139-140), testified to the general custom and practice then followed. He identified and explained the various markings and symbols appearing on petitioner's naturalization papers.

According to Mr. Dillon, an alien would initiate a naturalization proceeding by completing a preliminary form for citizenship to which was attached his declaration of intention. These papers would then be forwarded to the Service office in the district in which the alien's examination was to take place (R. 144-145). He identified petitioner's "Preliminary Form for Citizenship" (Ex. 5) and "Declaration of Intention" (Ex. 2) as the forms used in 1931 for this purpose and noted further that these had been completed and signed (R. 145). The Preliminary Form had a question, No. 29, "Have you ever been arrested or charged with violation of any law of the United States, or any state, or any city ordinance or traffic regulation?" On the completed form

---

[3] The Preliminary Examiner, Frances Hardy, had died on July 1, 1953 (Ex. 24), and the Designated Examiner, James E. More, had died on March 9, 1935 (Ex. 23).

signed by petitioner, this was answered in the negative (R. 150).[6]

Mr. Dillon further explained that, after these forms had been received by the Service, the alien and his two witnesses would be called in. All three would be placed under oath and then separately examined by the Preliminary Examiner (R. 146-147) who would have the Preliminary Form. The practice in the examination of the alien was for the examiner to ask the alien to respond orally to the questions which he had already answered in writing on the form. The examiner would compare the oral with the written responses, placing check marks alongside the written answers when the two were the same (R. 147-148, 150). Petitioner's Preliminary Form contained these check marks. Specifically, a check mark appeared alongside his negative response to question No. 29 about prior arrests.

It was also the practice for the Preliminary Examiner to utilize the triplicate copy of the document titled the Petition for Citizenship, recording his findings as the examination progressed on the reverse side of this form under the heading "Result of Examination" (R. 148). These findings were based on the oral responses being given by the alien. In the appropriate place on the reverse side of the copy of petitioner's "Petition for Citizenship" (Ex. 4), there appeared the letters "N.C.R." which, Mr. Dillon explained, meant that, as a result of the alien's oral responses, the preliminary

---

[6] The written form was dated October 30, 1930, and signed by petitioner under the statement that he certified that all of the statements made in the application were true to the best of his knowledge and belief.

examiner had "determined" that he had no criminal record (R. 149-150). The initials "F.H.," which appeared under the date "8-3-31" on this document, were identified as those of Frank Hardy, a co-worker of Dillon's in the Brooklyn office in 1931.

Dillon testified that the practice was that, at the completion of this examination, the original Petition for Citizenship was filled out and sworn to by the alien (R. 150-151). All the papers were then forwarded to the Designated Examiner who would review the documents and interview the alien (who was still under oath) and make notations on the forms including his recommendations (R. 153-154). On the back of the copy of petitioner's Petition for Citizenship, Mr. Dillon identified the initials "J.M." following the date "8-3-31" as belonging to Designated Examiner James More, also a former co-worker (R. 154). Mr. Dillon further testified that More's markings showed that petitioner had orally stated to him that he had not been previously arrested and that More had recommended (by the letter "G") that the application for citizenship be granted (R. 155).

Dillon testified that there was "never" any inquiry concerning arrests prior to the preliminary examination. Only if the examiner found that he, the alien, admitted some arrest or was suspicious, would he write the Police Department for confirmation (R. 157-158). No adverse information appeared on petitioner's papers, and there was no indication that an investigation had been instituted (R. 158, 164).

ARGUMENT

1. The United States has naturalized large numbers of aliens because of a liberal policy of admitting aliens to citizenship. As a result, the government in such proceedings has relied (as it has in the imposition of income taxes) for the most part on the duty of applicants to make truthful responses to questions it deems significant in determining eligibility for naturalization, rather than undertaking the huge task of investigating every application. See *Johannssen v. United States*, 225 U.S. 227, 237-238. Truthful answers to questions such as those as to prior arrests are important not merely for what they themselves disclose as to arrests, but because false answers shut off a line of pertinent investigation.

The Naturalization Act of 1906, as amended, provides that an applicant for naturalization must establish that "he has behaved as a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States" during the five years preceding his petition for naturalization. 34 Stat. 596, 598, 8 U.S.C. (1934 ed.) 382; now 8 U.S.C. 1427(a). The showing is made by truthful answers to questions concerning moral character asked during the naturalization proceedings. If an applicant falsifies or conceals information, "the issue is not whether naturalization would have been denied appellant had he revealed his numerous arrests, but whether, by his false answers, the Government was denied the opportunity of investigating the moral character of the appellant and the facts

relating to his eligibility for citizenship." *Corrado* v. *United States*, 227 F. 2d 780, 784 (C.A. 6), certiorari denied, 351 U.S. 925; *United States* v. *Montalbano*, 236 F. 2d 757, 759-760 (C.A. 3), certiorari denied *sub nom. Genovese* v. *United States*, 352 U.S. 952; *United States* v. *Accardo*, 113 F. Supp. 783 (D. N.J.), affirmed, 208 F. 2d 632 (C.A. 3), certiorari denied, 347 U.S. 952.

In *Costello* v. *United States*, 365 U.S. 265, 272, this Court held that the concealment by the applicant of his true occupation (bootlegging) constituted a concealment of a material fact because, if he had revealed his true occupation, the applicant might have been found not to have the requisite moral character and therefore might have been denied citizenship. The false answers here are equally significant. Truthful answers by petitioner would have revealed arrests for at least five crimes (see *supra*, pp. 3-4), including such serious crimes as burglary and homicide occurring within five years of his application for naturalization, which are plainly relevant to the issue of his good moral character during that period. If petitioner had disclosed these arrests, investigation of his criminal record and the evidence of his moral character would have been required.

Petitioner's argument (Pet. 17-20) that every one of the arrests could have been shown to have been arbitrary is irrelevant to the issue of materiality. Whether the arrests were justified and whether the circumstances they revealed were sufficient to raise an issue as to good moral character was a matter which should have been explored at the proper time in the naturalization proceedings. Petitioner's deliberate concealment of the

arrests foreclosed inquiry into the nature of the arrests and into petitioner's behavior at the time. The government cannot be required now to prove that the arrests which he concealed were proper."[7]

There may be situations such as that presented by *Chaunt* v. *United States*, 364 U.S. 350, where, on the particular facts, denial of an arrest record cannot be deemed to have foreclosed pertinent inquiry. In *Chaunt* the defendant failed to disclose arrests (for distributing hand bills, making a speech in a public park, and disturbing the peace) all of which had occurred more than five years prior to naturalization. The Court pointed out that the arrests were made "some years prior to the critical five-year period" and involved no "moral turpitude" or "fraudulent conduct." *Id.* at 353. As to the government's argument that the

[7] Petitioner claims (Pet. 19-20) that the defense was improperly foreclosed during the denaturalization proceedings from ascertaining the circumstances of the arrests during cross-examination of government witnesses. However, since defense counsel repeatedly objected to the eliciting of background information by the government on direct examination (see, *e.g.*, R. 47-49, 59, 61, 63), petitioner can hardly be heard to complain that his cross-examination of the same witnesses was unduly limited.

There is also no basis to petitioner's claim (Pet. 18-19) that a number of the arrests (which he does not particularize) were illegal within the rationale of *United States* v. *Kessler*, 213 F. 2d 53 (C.A. 3). In *Kessler*, each time the alien had been arrested she was told by the state judge that the "arrests" involved were in fact "false arrests" for a crime, obstructing a highway, which was "unknown to the law of Pennsylvania." *Id.* at 56. The defendant testified at the denaturalization trial that she did not mean to lie and this statement is surely credible in view of the statements made by the state judge. In this case, the arrests for burglary, vagrancy, and homicide were not for crimes unknown to the law. Moreover, unlike the defendant in *Kessler*, petitioner did not take the stand to testify why he had not disclosed the arrests at the naturalization proceeding.

arrests might have led to disclosure of Communist affiliation, the Court noted that the government had not pursued a less tenuous lead, namely, Chaunt's admission on his original petition for naturalization that he was employed by and was a member of the International Workers Order, an organization which at that time was "said to be controlled by the Communist Party." *Id.* at 355. The Court found (*id.* at 354):

> The totality of the circumstances surrounding the offenses charged makes them of extremely slight consequence. Had they involved moral turpitude or acts directed at the Government, had they involved conduct which even peripherally touched types of activity which might disqualify one from citizenship, a different case would be presented.

Here, the arrests took place within the critical five-year period, they were for crimes involving moral turpitude, and there is no indication that the government would not have used this information to investigate further petitioner's moral character. Thus, this case is governed by *Costello* and not by *Chaunt*.

2. *a.* The government amply proved that petitioner had in fact given false answers to questions about arrests asked by Service examiners. The "Preliminary Form for Citizenship" (Ex. 5), signed by petitioner, contained a negative answer to the question as to arrests. Both that form and the "Petition for Citizenship" (Ex. 4), each of which bears the initials of a deceased examiner, contain symbols which indicate that both examiners had conducted oral examinations. Those symbols, the significance of which was explained

by a witness who was in the Brooklyn office of the Service the year petitioner was examined, show that petitioner had been orally asked and had untruthfully answered questions as to arrests. In addition, a departmental regulation required that oral inquiry be made into an applicant's arrests. 8 C.F.R. (1938 ed.) 70.7; see *United States* v. *Profaci*, 274 F. 2d 289, 291 (C.A. 2). The courts below properly found that all these circumstances taken together constituted clear and convincing proof that petitioner had fraudulently concealed his arrests.

b. Petitioner's attack on each constituent element of the proof is without merit.

(1) Petitioner urges (Pet. 11-12, 16) that, since the government charged only falsity "under oath" and such falsity occurred only during his oral interviews, the government could not rely upon his naturalization documents as evidence at trial. Even assuming that, because it had so framed its case,[9] the government was required to prove falsity at the oral interviews, it certainly does not follow that the naturalization documents

---

[8] This regulation went into effect on July 1, 1929. It provided in pertinent part that, during the oral examination of applicants, "[t]he question of possible arrests must be thoroughly covered. If the applicant has been arrested or charged with the violation of any law or ordinance, all the facts will be ascertained, including information as to whether conviction resulted."

[9] The complaint charged falsity under oath "in [petitioner's] naturalization proceedings" (R. 174). In its opening statement the government indicated it would prove that petitioner "falsified the fact of his prior arrest record during the course of his naturalization proceeding, commencing on August 3, 1931" (R. 7). "The Preliminary Form for Citizenship" (Ex. 5) was not made under oath and was dated October 30, 1930.

were irrelevant or inadmissible on that issue. Whether or not these documents embodied the actionable fraud, they were highly probative evidence as to what occurred at the oral interviews and as to petitioner's intent.

Nor is there substance to the further claim (Pet. 11) that since the Preliminary Form was not attached to the Petition for Citizenship, as were other naturalization documents, it could not be used in evidence. The other documents (the Declaration of Intention and Certificate of Arrival) were required by statute to be so attached. 34 Stat. 596-597. This is, however, no reason why another formal document in a government file signed by petitioner should be inadmissible.

(2) Petitioner also argues (Pet. 20-24) that since Mr. Dillon was not the examiner who interviewed petitioner his testimony could not be used. But Mr. Dillon testified only to the customary practice in the office at the time and the general understanding of the symbols used there. This evidence could properly be considered in connection with the physical documents which had been introduced. See Wigmore, *Evidence* (3rd ed., 1940), §§ 92-93; McCormick, *Evidence* (1954 ed.), § 162.

(3) There is no basis to petitioner's claim (Pet. 24-26) that the 1929 Service regulation, which was not introduced at trial, could not be judicially noticed by the court of appeals because it was adopted prior to the Federal Register and the Code of Federal Regulations. This Court has held that valid executive regulations are subject to judicial notice. *Caha* v. *United States*, 152 U.S. 211, 221-222; *Lilly* v. *Grand Trunk R. Co.*, 317 U.S. 481, 488-489.

Likewise specious is petitioner's attempt (Pet. 26-

27) to construe another provision of the 1929 regulations (8 C.F.R. (1938 ed.) 70.8) as providing that only sworn statements reduced to writing and signed by the applicant can be relied upon for denaturalization.[10] This provision which is designed to provide an internally consistent naturalization procedure is fairly construed as requiring the execution of the Petition for Citizenship which is signed and sworn to after the preliminary examination. This construction is in accord with the immediately preceding provision of the regulation requiring oral examination by Service investigators (8 C.F.R. (1938 ed.) 70.7). On the other hand, petitioner's construction is inconsistent with the administrative practice which has existed for many years of placing aliens under oath during the oral interrogation.

c. Cufari v. *United States*, 217 F. 2d 404 (C.A. 1), upon which petitioner so heavily relies (Pet. 20-23), is inapposite. It is true that there, as here, the original examiners were deceased at the time of trial and the government relied upon the testimony of others to show that it was customary to ask questions concerning prior arrests. However, in *Cufari*, the naturalization occurred in 1927 when there was no specific regulation requiring that there be oral inquiry by examiners relating to prior arrests and before the general use of a formal application which contained a written question con-

[10] 8 C.F.R. (1938 ed.) 70.8 provides in pertinent part: "All material statements of applicants for naturalization or applicants for certificates of citizenship and their witnesses should be in writing and under oath and signed by applicant or witness."

cerning arrests. See *id.* at 406.[11] The only document in evidence in that case indicating that a question concerning arrests had been asked and negatively answered was a "so-called Docket slip." This slip contained "somewhat unclear and fragmentary notes" which could be interpreted as indicating that the "no arrests" notation on it related to the applicant's father and not the applicant. *Id.* at 407, 409. In addition, Cufari himself testified that he had no recollection that any question concerning arrests had ever been asked him. *Id.* at 407. While the court of appeals believed that the "docket slip coupled with the evidence of practice and custom" was "enough to establish by the balance of probabilities that Cufari was asked if he had ever been arrested and answered that he had not," it ruled that such proof was insufficient to establish this fact "by clear, unequivocal, and convincing evidence which does not leave the issue in doubt." *Id.* at 409. Here the documents in evidence, the notations on them, and the specific requirement of the regulation furnish the convincing proof that was barely lacking in *Cufari*.

3. There is no substance to petitioner's claim (Pet. 27-28) that this proceeding was barred by the defense of laches. In *Costello* v. *United States*, 365 U.S. 265, 281-284, this Court merely assumed that the defense was available and then rejected it on the facts. As the Court noted, the lower courts have uniformly refused to entertain the defense in a denaturalization

[11] The informality of the proceedings prior to 1929 is also noted in *United States* v. *Profaci*, 274 F. 2d 289, 291 (C.A. 2), and *United States* v. *Kessler*, *supra*, 213 F. 2d at 57.

proceeding and, while this Court had never been faced with the precise question before, it has uniformly "applied the principle that laches is not a defense against the sovereign." *Id.* at 281.

Even assuming that the defense of laches is available in a denaturalization action, it was inapplicable in the circumstances of this case. Just as the petitioner in *Costello*—who was naturalized in 1925 and ordered denaturalized in 1959—petitioner here failed to show that the lapse of time between his naturalization in 1931 and the institution of this proceeding in 1957 worked to his prejudice. The complete answer was given by the court below: "It is no more than speculation in the present case that the Government's delay adversely affected Oddo; the quality of the Government's proof of fraudulent concealment renders remote the possibility that Oddo could have rebutted it more effectively, if required to do so at an earlier date, and Oddo offered no evidence of his own to substantiate such a possibility. Indeed, since the Government bore the burden of proof, the lapse of time may have been more prejudicial to its case than to Oddo's." 314 F. 2d at 119.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

July 1963.